88-1082

No.

Supreme Court, U.S.
FILED
DEC 27 19
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BABU PATEL and BANK OF RAVENSWOOD, as Trustee Under Trust No. 25-4621,

Petitioners,

vs.

MARYLAND CASUALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether Rule 47 as set forth in the Federal Rules of Appellate Procedure can be abrogated without an act by the United States Supreme Court or the United States Congress.

II. Whether Rule 31 as set forth in the Federal Rules of Appellate Procedure supercede *local* Circuit Rule 31 as promulgated by the United States Appellate Court, Seventh Circuit.

III. Whether a party's right of due process under the 14th Amendment of the United States Constitution, can be abrogated by the Federal Appellate Court, Seventh Circuit, by that court modifying and creating *local* Circuit Rule 31, which is inconsistent and contrary to Rule 31 and Rule 47 of the Federal Rules of Appellate Procedure.

LIST OF PARTIES

The named Petitioners are Babu Patel, as a beneficiary of an Illinois land trust, and Bank of Ravenswood as Trustee of the insured real estate under Trust No. 25-4621.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BABU PATEL and BANK OF RAVENSWOOD, as Trustee Under Trust No. 25-4621,

Petitioners,

vs.

MARYLAND CASUALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, BABU PATEL and BANK OF RAVENSWOOD as Trustee under Trust No. 25-4621, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 2, 1988 and September 27, 1988.

OPINIONS BELOW

The orders denying the petition to file the appellate brief and denying a rehearing to file said appellate brief was entered by the Court of Appeals on June 21, 1988

(Appendix D-1), September 2, 1988 (Appendix E-1) and September 27, 1988 (Appendix F-1) respectively. The opinion of the United States Court of Appeals, Seventh Circuit, as set forth in the September 2, 1988, order of said court was not unanimous; Honorable Richard D. Cudahy voting to accept the appellate brief.

JURISDICTION

The basis for jurisdiction in the United States District Court was diversity of citizenship between the Petitioner and Respondent having in controversy a matter in excess of $10,000.00.

STATUTE INVOLVED

28 U.S.C. § 2071

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court, Rules of Federal Appellate Procedure, Rule 47, Rules of Federal Appellate Procedure, Rule 31, Federal Rules for Civil Procedure, Rule 83. Local Rules involved: Federal Court of Appeals, Seventh Circuit, Rule 31.

STATEMENT OF THE CASE

This case was brought by an insured party for the purpose of receiving payment for a fire loss alleged to be in excess of $180,000.00, which the insurer refused to pay. The insurer based its refusal upon the failure of the insured to file a cause of action against the insurer within the period of time as prescribed in the underlying policy of insurance. Specifically, the policy set forth a one year requirement in which to file a cause of action against the insurer from a resultant loss. The issues raised in the lower court include the proper determination of when the one-year period began to run and whether the insurer is precluded by estoppel from raising a policy defense.

The insurer filed a Motion for Summary Judgment pursuant to the Rules of Federal Civil Procedure, which was granted by the Federal District Court (Appendix A-1). Petitioner's Petition for Rehearing was denied (Appendix B-1). The insured next filed a Notice of Appeal (Appendix C-1), which was timely filed pursuant to Federal Appellate Rule 31, but was denied the right to file said brief as a result of the United States Clerk's Office, Seventh Circuit, refusing to accept said brief as said brief was deemed to be untimely based upon *local* Circuit Rule 31 as promulgated by the Seventh Circuit Court of Appeals.

The insured, on the following day the brief was due, attempted again to file said brief, this time with a motion to file said brief instanter. The United States Clerk's Office, Seventh Circuit, accepted the brief at that time. The Seventh Circuit Court of Appeals issued an order denying the acceptance of the brief and requested the insured's attorney file a brief in support of the concept of

excusable neglect (Appendix D-1). Counsel for the insured did file said brief. Subsequently, the Seventh Circuit Federal Court of Appeals again denied the filing of said brief (Appendix E-1), and after review of a petition for rehearing, denied the rehearing (Appendix F-1). The United States Court of Appeals, Seventh Circuit, returned their mandate on October 28, 1988 (Appendix G-1).

It is from the orders of June 21, 1988, September 2, 1988, and September 27, 1988, denying the filing of said brief from which Petitioners appeal inasmuch as Petitioner has been denied the right of due process and equal protection under the law based upon the Seventh Circuit Court of Appeals breaching the separation of powers by enacting a *local* Circuit Rule 31, which is inconsistent with and contrary to Rules 31 and 47 of the Rules of Federal Appellate Procedure.

REASONS FOR GRANTING THE WRIT

The United States Constitution is clear. A separation of powers is one of the primary concepts upon which the United States Constitution was predicated and enacted. The designers and writers of the United States Constitution were most careful to specifically outline the rights and duties of the Executive, Legislative, and Judicial Branches of government and embodied these delineations in Article I of the United States Constitution.

I.

RULE 47 AS SET FORTH IN THE FEDERAL RULES OF APPELLATE PROCEDURE CANNOT BE ABROGATED WITHOUT AN ACT BY THE UNITED STATES SUPREME COURT OR THE UNITED STATES CONGRESS.

Title 28 U.S.C. Section 2071 is a statute promulgated by Congress pursuant to Article I, Section 8 CL. 9 of the United States Constitution. *Brown v. E.W. Bliss Co.*, C.A. 8 (Mo.) 1987, 818 F.2d 1405.

Title 28 U.S.C. Section 2071 is a legislative grant of authority to the U.S. Supreme Court and all courts established by Act(s) of Congress to prescribe rules for the conduct of their business.

As a consequence of 28 U.S.C., Section 2071 along with the Enabling Act, the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure were established. Presumably, these Rules were established in an effort to promulgate a uniform procedure of practice throughout the Federal Court system established in the United States. In this manner, a party could be assured of receiving the same rights of due process and equal protection as enacted in Section I of the 14th Amendment to the United States Constitution in all Federal Judicial Districts. Certainly, it is understood the Federal Government intended to protect a party's rights pursuant to the 14th Amendment from being abridged by the States, therefore, it cannot be said the Federal Government intended, however, to grant a branch of the Federal Government (the Judiciary in this instance) the right to abridge a party's constitutional rights.

Inasmuch as the 14th Amendment Section 8, CL. 9 affords the Petitioner equal protection under the law as well as due process and inasmuch as Article III, in part grants

the U.S. Supreme Court judiciary powers along with the implied right to enact rules and procedures to be followed in the Federal Court system, any inconsistency with Rules of Federal Appellate Procedure, i.e., Rules 31 and 47, which shortens the length of time in which Petitioner can file a brief, serves to abrogate his rights under the prevailing Rules of Federal Appellate Procedure. The Seventh Circuit Court of Appeals cannot enact rules inconsistent with prevailing rules of the Rules of Federal Appellate Procedure and cannot either pervade the separation of power restrictions as imposed under the U.S. Constitution by enacting rules inconsistent with the Rules of Federal Appellate Procedure as to do so clothes the Judiciary with legislative authority. Any breach of this separation of powers must be authorized by legislative act. *Nixon v. Sirica* (1973), 487 F.2d 700, 159 U.S. App. D.C. 58.

II.

RULE 31 AS SET FORTH IN THE FEDERAL RULES OF APPELLATE PROCEDURE SUPERCEDES *LOCAL* CIRCUIT RULE 31 AS PROMULGATED BY THE UNITED STATES APPELLATE COURT, SEVENTH CIRCUIT.

Each branch of government must retain its essential powers and independency if the constitutional structure is to be protected. *Pacemaker Diagnostic Clinic of America v. Instromedix, Inc.*, C.A. Or. 1984, 725 F.2d 537, certiorari denied 105 S.Ct. 100, 48 U.S. 824.

Petitioner has a fundamental right to have this cause heard by this court based upon the violation of Petitioner's rights pursuant to Article I and the 14th Amendment of the United States Constitution. *Atkins v. U.S.*, 1977, 556 F.2d 1038, 214 Ct. Cl. 19, 86, certiorari denied 98 S.Ct. 718, 434 U.S. 1009; *Hilliard v. Scully*, D.C.N.Y. 1982, 537 F.Supp. 1084. Procedural rights are a protect-

able right pursuant to the 14th Amendment and as such vest authority of this court to review any abrogation of such rights. *Smith v. Organization of Foster Families for Equality and Reform,* N.Y. 1977, 97 S.Ct. 2094, 431 U.S. 816.

If the Appellate Court of the Seventh Circuit is permitted to enact rules which are inconsistent and/or contrary to the Rules of Federal Appellate Procedure, and therefore, inconsistent with Rules as promulgated in other Federal District Court Circuits then the law shall not apply to all persons in a like manner, thereby subjecting persons to arbitrary exercises of capricious judicial power. This court is compelled to protect Petitioner's rights (sic. pursuant to the Rules of Federal Appellate Procedure). *Caldwell v. State of Texas,* Tex. 1891 S.Ct. 224, 137 U.S. 692.

The law of the land with regard to the method a party may avail themselves of their right of due process is espoused through the Rules of Federal Appellate Procedure. If those rules are abridged within a circuit, the rights to which those persons within that circuit would otherwise have become abrogated. *Walker v. Sauvinet,* La. 1875, 92 U.S. 90; *Owens v. Battenfield,* C.C.A. Okla. 1929, 33 F.2d 753, certiorari denied 50 S.Ct. 88, 280 U.S. 605.

The Seventh Circuit Federal Appellate Court has refused to grant Petitioner due process and equal protection under the law by refusing to grant Petitioner the right to file an appellate brief in accordance with Rules of Federal Appellate Procedure, Rule 31. Petitioner has therefore not had an opportunity to be heard in accordance with the prevailing law, though Petitioner has an unqualified right to be heard. *Wilson v. Standefer,* Tex. 1902, 22 S.Ct. 384, 184 U.S. 399. Petitioner has not been

heard in the Appellate Court Seventh Circuit though he has a right to be heard in conformity with due process. *Lynde v. Lynde,* N.Y. 1901, 21 S.Ct. 555, 181 U.S. 186; *Fay v. Noia,* N.Y. 1963, 83 S.Ct. 822, 373 U.S. 391.

Here below is a discussion as to the reasons Federal Appellate Court, *local* Rule 31 abrogates and is violative of a party's right to due process and equal protection under the law and the reasons *local* Rule 31 should be deemed invalid.

The rule making power of the Federal Courts found in statutes, rules and other provisions of law is appropriately viewed as a legislative delegation. *In re: Grand Jury Proceedings,* D.C. Va. 1983, 558 F.Supp. 532. The Federal Rules of Appellate Practice, Rule 47 establishes the policy of Federal Courts promulgating rules which cannot be inconsistent with the established Rules of Federal Civil Procedure (sic. Rule 83), and Federal Rules of Appellate Procedure, Rule 31. The policy as set forth in Federal Civil Procedure Rule 83 and Federal Rules of Appellate Procedure, Rule 31 are dyametrically opposed to and inconsistent with *local* Rule 31 as enacted by the Federal Appellate Court, Seventh Circuit.

Federal Civil Procedure Rule 83 and Federal Rules of Appellate Procedure, Rule 31, as promulgated are considered to have the full force and effect of a statute. *Laker Airways, Ltd. v. Pan American World Airways,* D.C. D.C. 1984, 103 R.R.D. 42. In the event there shall be a conflict between the Rules and statutory law, the statutory law (i.e., Federal Rules of Appellate Procedure) prevails. *Marane, Inc. v. McDonalds Corp.,* C.A. Ill. 1985, 755 F.2d 106.

Petitioner argues *local* Circuit Rule 31 of the Federal Appellate Court, Seventh Circuit directly conflicts with

and is inconsistent with Rule 83 of the Federal Rules of Civil Procedure and Rule 47 of the Federal Rules of Appellate Procedure. Moreover, inasmuch as the Petitioner's time to file an appeal with the Federal Appellate Court, Seventh Circuit, is shortened, the local rule is substantive in nature. However, whether *local* Rule 31 be deemed substantive or procedural, the enforcement of that Rule should yield to the strong presumptive validity of a properly promulgated Federal Procedural Rule, the latter of which should therefore be upheld. *Rosales v. Honda Motor Co., Ltd.*, L.A. Tex. 1984, 726 F.2d 259.

III.

A PARTY'S RIGHT OF DUE PROCESS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION, CANNOT BE ABROGATED BY THE FEDERAL APPELLATE COURT, SEVENTH CIRCUIT.

Federal Appellate Court Rule 47 is a rule promulgated by the United States Supreme Court pursuant to 28 U.S.C. § 2071. Rule 47 specifically provides the Courts of Appeals may regulate their practice in any manner not inconsistent with the Federal Rules of Appellate Procedure. Inasmuch as Rule 31 of the Federal Appellate Court sets the time for filing an appellate brief to be within forty (40) days after the date on which the record is filed and the Federal Appellate Court, Seventh Circuit *local* Circuit Rule 31 provides that the date for timely filing of Appellate briefs shall be forty (40) days from the date the appeal is docketed, an inconsistency is created with one another inasmuch as the date the record is due and the docketing date are not concurrent.

Local Circuit Rule 31, Seventh Circuit, has, in fact, shortened the period of time in which an appellant may file a brief. Therefore, the Federal Appellate Court,

Seventh Circuit by virtue of *local* Circuit Rule 31 has violated the intent of 28 U.S.C. § 2071, as well as Rule 47 of the Rules of Appellate Procedure. This violation has caused the Petitioner to lose his right of due process and equal protection under the law inasmuch as other petitioners in other jurisdictions, who rely on Rule 47, are granted a longer period of time in which to file a brief consistent with Rule 31 of the Rules of Federal Appellate Procedure.

In the event the Federal Appellate Court, Seventh Circuit is allowed to continue to promulgate rules inconsistent with the rules of appellate procedure as established by the United States Supreme Court and/or in violation of 28 U.S.C. § 2071, there would be no check and balance system in which to prevent said court from becoming more autonomous than is otherwise the intent of the legislative and the United States Supreme Court as specifically granted through Rule 47 of the Rules of Appellate Procedure. Such action would create havoc with regard to the rights of various individuals within the Seventh Circuit and serve to abrogate the ability of Petitioners and their attorney to rely upon the Rules of Federal Appellate Procedure as codified by the United States Supreme Court pursuant to 28 U.S.C. § 2071.

The United States Supreme Court is the ultimate and last bastion of law in the land and as such should insure persons, who avail themselves of the law as promulgated through legislative act, that they will be afforded their right to due process and equal protection under the law as provided in the United States Constitution.

At this juncture, a discussion of the merits of the underlying cause are not deemed germane to the writ for certiorari. The only issue here presented is the validity of Seventh Circuit, *local* Circuit Rule 31 in light of Rules

31 and 47 of the Rules of Federal Appellate Procedure and Rule 83 as set forth in the Federal Civil Procedure. Petitioner has timely filed a Notice of Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, and has been prevented from timely filing an appellate brief, which abridges Petitioner's unqualified right of due process under the United States Constitution.

This court should therefore invalidate *local* Circuit Rule 31 of the Federal Appellate Court, Seventh Circuit, thereby causing Petitioner's brief to be deemed as timely filed with the United States Clerk of the Federal Court, Northern District of Illinois, Eastern Division.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Attorneys for Petitioners

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5488 Date: March 23, 1988

Name of Assigned Judge: JAMES H. ALESIA

Case Title: Patel v. Maryland Casualty Co.

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

Defendant's motion for summary judgment is GRANTED. This case is dismissed WITH PREJUDICE AND WITHOUT COSTS. Status hearing set for June 1, 1988 is stricken.

* * * * *

(Reserved for use by the Court)

ORDER

Defendant Maryland Casualty Co. ("Maryland Casualty") filed a motion for summary judgment alleging that plaintiff Babu Patel ("Patel") failed to file a suit within one year after the occurrence of a loss. The loss covered by the policy issued by Maryland Casualty occurred on February 13, 1983. Patel did not file this action until June 17, 1986. Consequently, Maryland Casualty argues that this suit is barred by the statute of limitations. Patel argues that an intervening bankruptcy action tolled the running of the limitations period. Because we find that the contractual statute of limitations was enforceable and was not tolled, we dismiss the action.

The policy issued to Patel contains a clause which provides that policyholders must commence suits on the policy within twelve months after a loss or be barred from pursuing any suit. Under Illinois law, this clause is enforceable. *See Wilson v. Indiana Insurance Co.*, 150 Ill. App. 3d 669, 672, 502 N.E.2d 69, 71 (4th Cir. 1986) (additional citations omitted).

When a claimant files a proof of loss, the limitations period is tolled until the date the claim is denied. *See* Ill. Rev. Stat. ch. 73, para. 755.1 (1985). Patel asserts that he filed a claim in June or July of 1983. Maryland Casualty asserts that the claim was filed on October 12, 1983. The loss occurred on February 13, 1983. If Patel had filed his proof of loss on June 1, 1983, 105 days of the limitations period would have elapsed. There is no question that Maryland Casualty denied Patel's claim on March 6, 1984. Even giving Patel the benefit of the doubt regarding the dispute over when the claim of loss was filed, on the date that Maryland Casualty denied the claim, Patel had 260 days in which to comply with the one-year contractual statute of limitations. Patel, however, did not file this suit until June 17, 1986, a date well without the applicable limitations period.

To escape the limitations bar, Patel argues that his intervening bankruptcy action tolled the running of the limitations period. Specifically, Patel argues that the time in which he was required to file the suit under the policy was extended in accordance with section 108 of the Bankruptcy Code. *See* 11 U.S.C. § 108. Because we find that section 108 is inapplicable, we dismiss Patel's suit as untimely.

Under certain circumstances, section 108 allows an appointed trustee an extension of time for filing an action or for doing a specific act to preserve a debtor's rights. Under section 108(a), on the debtor's behalf, a trustee may commence an action which otherwise would have been forfeited by law or agreement two years after an order for relief is entered in the bankruptcy action. *See In re T.C.I. Limited*, 21 Bankr. 876, 878 (N.D. Ill. 1982). Section 108(b) confers similar powers on the trustee. *See* 11 U.S.C. § 108(b). We specifically note that, unless a debtor is a debtor-in-possession, these provisions only provide an extension to the trustee and do not serve to expand the rights of the debtor. *See In re Flying "S" Land & Cattle Co., Inc.*, 71 Bankr. 183, 185 (D. Nev. 1987); *In re Craig*, 7 Bankr. 864, 865-66 (E.D. Tenn. 1980).

In this case, a trustee was appointed after Patel filed for bankruptcy in May of 1983. Maryland Casualty denied Patel's claim on March 6, 1984. Patel did not file suit within the applicable limitations period. Consequently, the suit is barred. Accordingly, we dismiss this action with prejudice and without costs.

/s/ James H. Alesia
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5488 Date: April 7, 1988

Name of Assigned Judge: JAMES H. ALESIA

Case Title: Patel v. Maryland Casualty Co.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Plaintiff's motion for reconsideration of this Court's order granting defendant's motion for summary judgment and dismissing this case is DENIED. This Court's order of March 23, 1988 stands.

* * * * *

(Reserved for use by the Court)

ORDER

Plaintiff Babu Patel ("Patel") has filed a motion for reconsideration. Patel asks this Court to reconsider its decision to grant defendant Maryland Casualty Co.'s ("Maryland Casualty") motion for summary judgment. Patel argues that this Court failed to consider his argument that Maryland Casualty is estopped from relying upon the contractual statute of limitations when we decided their motion for summary judgment. We disagree. Consequently, we deny Patel's motion for reconsideration.

Patel claims that Maryland Casualty negotiated with the trustee appointed in his bankruptcy action after they sent a letter to Patel denying his claim. Because of the continued negotiation, Patel argues that Maryland Casualty has waived their right to raise the contractual limitations period as a defense to this action.

In support of this argument, Patel attached two letters. In a letter dated August 3, 1984, counsel for Maryland Casualty merely acknowledged that the trustee had communicated with Maryland Casualty. *See* Letter from Richard A. Buchanan to Ilene F. Goldstein (Aug. 3, 1984). Patel's copy of this letter also shows a handwritten note regarding an offer to compromise in the amount of $10,000. Patel presents no evidence which indicates that Maryland Casualty initiated the offer. The second letter from the trustee to counsel for Maryland Casualty indicates that the trustee offered "to settle the claim [that] the estate of Babu Patel has against Maryland Casualty Company for the amount of $10,000." *See* Letter from Ilene F. Goldstein to Richard A. Buchanan (Aug. 13, 1984). As we stated in our previous opinion, section 108 of the Bankruptcy Code grants to the trustee an extension of time in which to commence an action which otherwise would have been forfeited by law or agreement. *See* 11 U.S.C. § 108. Section 108 does not expand the rights of the debtor unless

the debtor is a debtor-in-possession. *See In re Flying "S" Land & Cattle Co., Inc.*, 71 Bankr. 183, 185 (D. Nev 1987); *In re Craig*, 7 Bankr. 864, 865-66 (E.D. Tenn. 1980). In effect, Patel argues that a denial of a claim is nullified when a trustee attempts to take advantage of the extension of time which Congress granted in section 108. If we were to accept this argument, this Court, in effect, would be expanding the debtor's rights. We do not choose to do so.

Accordingly, Patel's motion to reconsider is denied.

/s/ James H. Alesia
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 5488
Notice of Appeal

BABU PATEL and BANK OF RAVENSWOOD
under Trust No. 25-4621,

Plaintiffs,

VS.

MARYLAND CASUALTY COMPANY,

Defendant.

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Notice is hereby given that Babu Patel and Bank of Ravenswood under Trust No. 25-4621, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the orders of Judge James Alesia entered in this action on March 23, 1988 and April 7, 1988.

LAW OFFICES OF GARY S. TUCKER

/s/ Gary S. Tucker
Attorneys for Plaintiffs

C-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 5488

BABU PATEL and BANK OF RAVENSWOOD
under Trust No. 25-4621,

Plaintiffs,

VS.

MARYLAND CASUALTY COMPANY,

Defendant.

STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

I. Does the automatic stay provisions provided in the Bankruptcy Court stay a limitation contained in a contractory agreement setting for a specific time in which to file suit.

II. Is the one (1) year limitation period in which to file suit as set forth in an insurance contract waived if after the insurer rejects the claim for fire loss the insurer renegotiates said loss, makes an offer of compromise within the one (1) year period for filing said suit.

LAW OFFICES OF GARY S. TUCKER

/s/ Gary S. Tucker
Attorneys for Plaintiffs

C-3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 5488

BABU PATEL and BANK OF RAVENSWOOD
under Trust No. 25-4621,

Plaintiffs,

v.

MARYLAND CASUALTY COMPANY,

Defendant.

CERTIFICATE

We are not ordering any transcripts because there were not any hearings that were transcribed affecting the issues on appeal.

LAW OFFICES OF GARY S. TUCKER

/s/ Gary S. Tucker
Attorneys for Plaintiffs

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 21, 1988.

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

BABU PATEL and BANK OF RAVENSWOOD
UNDER TRUST NO. 25-4621,

Plaintiffs-Appellants,

No. 88-1784 vs.

MARYLAND CASUALTY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5488—Judge James H. Alesia.

This matter comes before the court for its consideration of the "MOTION TO FILE BRIEF INSTANTER" filed herein on June 16, 1988, by counsel for appellants.

On consideration thereof,

IT IS ORDERED that said motion is DENIED. Appellants' counsel is directed to file a memorandum of law on excusable neglect and to demonstrate why his conduct constitutes excusable neglect. This memorandum shall be filed by no later than July 5, 1988.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 2, 1988.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

BABU PATEL and BANK OF RAVENSWOOD
UNDER TRUST NO. 25-4621,

Plaintiffs-Appellants,

No. 88-1784 vs.

MARYLAND CASUALTY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5488—James H. Alesia, **Judge.**

This matter comes before the court for its consideration of the following documents:

1. "ANSWER TO RULE TO SHOW CAUSE" filed herein on June 22, 1988 by counsel for the appellant.

2. "MEMORANDUM OF LAW IN SUPPORT OF BABU PATEL'S MOTION TO FILE BRIEF INSTANTER ON THE BASIS OF EXCUSABLE NEGLECT" filed herein on July 5, 1988 by counsel for the appellant.

3. "RESPONSE TO MEMORANDUM OF LAW IN SUPPORT OF BABU PATEL'S MOTION TO FILE BRIEF INSTANTER ON THE BASIS OF EXCUSABLE NEGLECT" filed herein on July 29, 1988 by counsel for the appellee.

Appellants' brief was due on May 30, 1988. Counsel for appellants neither filed a brief in a timely fashion nor filed a motion for extension of time before the briefs due date. The brief was not filed until June 15, 1988 and was not accompanied by a motion for leave to file it instanter.

The district court history of this case is replete with further examples counsel's carelessness and neglect. Counsel's performance adds up to a pattern of violation of both district court and appellate court rules. Accordingly,

IT IS ORDERED that this case is DISMISSED for failure to prosecute it in a timely manner and in accordance with the rules of this court.

Judge Cudahy would vote to accept the brief.

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 27, 1988.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

BABU PATEL and BANK OF RAVENSWOOD
UNDER TRUST NO. 25-4621,

Plaintiffs-Appellants,

No. 88-1784 vs.

MARYLAND CASUALTY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5488—Judge James H. Alesia.

This matter comes before the court for its consideration of the "MOTION FOR REHEARING" filed herein on September 16, 1988, by counsel for the plaintiffs-appellants. On consideration thereof,

IT IS ORDERED that the motion is DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

Date: October 28, 1988

Mr. H. Stuart Cunningham, Clerk
United States District Court
219 South Dearborn
Chicago, Illinois 60604

Re: BABU PATEL and BANK OF RAVENSWOOD UNDER TRUST NO. 25-4621, Plaintiffs-Appellants,

vs.

MARYLAND CASUALTY COMPANY,
Defendant-Appellee.

U.S.C.A.-7 No. 88-1784 District Court No. 86 C 5488
Judge James H. Alesia

Dear Clerk:

Herewith is the mandate of this Court in the above-entitled appeal. "A certified copy of the judgment and a copy of the opinion of the Court, if any, and any direction as to costs shall constitute the mandate." (F.R.A.P. 41(a)). I am also returning the original record of your District Court, which was transmitted to this office for use

on appeal. Please acknowledge receipt on the enclosed copy of this letter.

Contents of Record being Returned:	Contents of Record to be Returned Later:
1 Vol. Pleadings	

/s/ Mabel L. Boher
U.S.C.A. Deputy Clerk

Received above mandate and record from the Clerk of the United States Court of Appeals for the Seventh Circuit.

Date: _____ _____
Clerk of District Court

Copies Mailed to:

Gary S. Tucker, 180 North LaSalle Street, Chicago, Illinois 60601

James T. Ferrini, 10 South LaSalle Street, Chicago, Illinois 60603

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

(2)

No. 88-1082

FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BABU PATEL and BANK OF RAVENSWOOD, as Trustee Under Trust No. 25-4621,

Petitioners,

vs.

MARYLAND CASUALTY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES T. FERRINI *
RICHARD A. BUCHANAN
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15pp

QUESTIONS PRESENTED

I. Whether petitioners waived this Court's review of the constitutional issue alleged herein by their failure to raise the issue in the Seventh Circuit.

II. Whether Local Rule 31 of the Seventh Circuit, establishing an expedited briefing schedule in that Circuit, is consistent with Federal Rule of Appellate Procedure 31(a) specifically authorizing the Circuits to "shorten the period . . . for serving and filing briefs."

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In The

Supreme Court of the United States

October Term, 1988

BABU PATEL and BANK OF RAVENSWOOD, as Trustee Under Trust No. 25-4621,

Petitioners,

vs.

MARYLAND CASUALTY COMPANY,[1]

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Seventh Circuit's order of September 2, 1988 sets forth that Court's reasons for dismissing the petitioners' appeal. The order is reproduced in the Appendix to the Petition for Writ of Certiorari at page E-1.

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[1] Maryland Casualty Company is a wholly-owned subsidiary of American General Corporation, and has investments in the following: Advanced Technology System, Inc.; Marcasco Company.

STATUTES AND RULES INVOLVED

Federal Rule of Appellate Procedure 31(a)

Rule 31. Filing and Service of Briefs.

(a) Time For Serving and Filing Briefs. The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a Court of Appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases or by order for specific cases.

* * *

Local Rule 31, Seventh Circuit

Circuit Rule 31. Filing of Briefs and Failure to Timely File Briefs.

(a) Time for Filing Briefs. Except in agency cases, the time for filing briefs shall run from the date the appeal is docketed, regardless of the completeness of the record at the time of the docketing, unless the court orders otherwise.

* * *

PREFATORY NOTE: A PATTERN OF NEGLECT

Although largely accurate, petitioners' Statement of the Case omits several crucial facts.

Three times petitioners' case was dismissed by the District Court for want of prosecution. (Appendix to this brief, A-1, A-2, A-3). The case itself involved an untimely filing—the District Court granted respondent's motion for summary judgment based on petitioners' late filing of their lawsuit. (Page B-2 of Petition for Writ of Certiorari). It was in this context that the Seventh Circuit refused to accept petitioners' late-filed brief, noting:

> The district court history of this case is replete with further examples of counsel's carelessness and neglect. Counsel's performance adds up to a pattern of violation of both district court and appellate court rules. (Order of September 2, 1988)

Even petitioners' constitutional argument in this Court is untimely—it was not raised in the Seventh Circuit.

Petitioners' opportunity to be heard is not an "unqualified right" as they assert. It is indeed an *opportunity*, to be governed by the rules of procedure and practice of the Federal Courts. See, *Boddie v. Connecticut*, 401 U.S. 371 (1971). The failure of petitioners to follow Seventh Circuit Rule 31—a rule specifically authorized by FRAP 31—mandates denial of their petition for a writ of certiorari.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

PETITIONERS HAVE WAIVED REVIEW BY THIS COURT OF THE SUBSTANTIVE ISSUE RAISED HEREIN. THEY DID NOT RAISE A CONSTITUTIONAL CHALLENGE IN THE COURT BELOW.

None of the arguments made by petitioners in this Court were raised in the Seventh Circuit. Therefore, the relief requested has been waived.

After petitioners failed to timely file their brief below, they were ordered to submit a memoranda of law in support of their motion to file a brief instanter. Petitioners' argument therein was limited to an explanation that they were not aware of Circuit Rule 31 and that their failure to file a timely brief amounted to excusable neglect. After the appeal was dismissed, petitioners filed a motion for rehearing. That motion was likewise limited in scope—it simply challenged the Seventh Circuit's finding that petitioners were careless and negligent.

Petitioners have taken a different tack in this Court, raising a purported constitutional issue for the first time. Having failed to make this argument below, the challenge has been waived. See, *Michael v. Louisiana*, 350 U.S. 91 (1956); *Yakus v. United States*, 321 U.S. 414, 444 (1943).

II.

THE PLAIN LANGUAGE OF FEDERAL RULE OF APPELLATE PROCEDURE 31(a) AUTHORIZES THE SEVENTH CIRCUIT TO ESTABLISH EXPEDITED BRIEFING SCHEDULES.

Petitioners' contention that an inconsistency exists between FRAP 31 and Seventh Circuit Rule 31 ignores the plain language of FRAP 31. The FRAP provides for the creation of shortened briefing schedules by local rule:

> If a Court of Appeals is prepared to consider cases and the merits promptly after the briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases or by order for specific cases. (FRAP 31(a))

Seventh Circuit Rule 31 meets the parameters of FRAP 31—the Circuit rule shortens periods prescribed by FRAP 31 for *all* cases before the Seventh Circuit. The Circuit rule is thus entirely *consistent* with FRAP 31. See, *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211, 1222 (5th Cir. 1969); *League of Voluntary Hospitals and Homes of New York v. Local 1199, Drug and Hospital Union*, 490 F.2d 1398, 1401 (Temp. Emer. Ct. App. 1973); *9 J. Moore, B. Ward, Moore's Federal Practice*, Sec. 231.02 (Sept. 1986).

The constitutional argument raised by petitioners was rejected by the Court in *League of Voluntary Hospitals, supra.* The defendants therein claimed they were denied due process because the Court reduced briefing time. The Court found the Act at issue there, as well as FRAP 31(a), authorized the expedited briefing schedule. Several additional Circuits have likewise exercised the option granted by FRAP 31 and enacted local rules shortening the briefing process. See, e.g., Local Rule 31, First Cir-

cuit (reducing time for filing briefs from 40 to 35 days); Local Rule 31, Fourth Circuit (shortening time periods in criminal cases); Local Rule 31, Tenth Circuit (requiring time period for filing of brief to run from date notice of appeal is filed in certain circumstances); Local Rule 31-2.2, Ninth Circuit (reducing time in criminal cases).

The impact of the foregoing is apparent. Local Rule 31 of the Seventh Circuit is consistent with and indeed specifically authorized by FRAP 31. The petition for a writ of certiorari should thus be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

JAMES T. FERRINI *
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Attorneys for Respondent

* Counsel of Record

APPENDIX

District Court Order, December 8, 1986 ..... A-1
District Court Order, July 28, 1987 ..... A-2
District Court Order, February 19, 1988 ..... A-3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5488 Date: Dec. 8, 1986

Name of Assigned Judge: PAUL E. PLUNKETT

Case Title: Patel v. Maryland Casualty Co.

* * * * *

DOCKET ENTRY:

* * * * *

(11) ☒ This case is dismissed * * *
☐ pursuant to * * *
☒ General Rule 21 (want of prosecution)

* * * * *

☒ Docketing to mail notices.

Document #12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5488 Date: July 28, 1987

Name of Assigned Judge: JAMES H. ALESIA

Case Title: Babu Patel, et al. v. Maryland Casualty Co.

* * * * *

DOCKET ENTRY:

* * * * *

(2) ☒ [Other docket entry:]
Plaintiff failed to appear for status hearing.

* * * * *

(11) ☒ This case is dismissed * * *
☒ pursuant to * * *
☒ General Rule 21 (want of prosecution)

* * * * *

☒ Docketing to mail notices.

Document #32

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5488 Date: February 19, 1988

Name of Assigned Judge: JAMES H. ALESIA

Case Title: Babu Patel, et al. v. Maryland Casualty Co.

* * * * *

DOCKET ENTRY:

* * * * *

(2) ☒ [Other docket entry:]
Plaintiff failed to appear for status hearing. This case is dismissed for want of prosecution. The Court notes that this case was dismissed for want of prosecution by Judge Plunkett on December 8, 1986 and reinstated and again by this Court on July 28, 1987 and subsequently reinstated.

* * * * *

☒ Docketing to mail notices.

Document #42